83-1924

No.

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

City of El Segundo; J.C. Devilbiss;
James Johnson and John Hampton,
Petitioners, Appellees and Defendants,

vs.

Deborah Lynn Thorne,
Respondent, Appellant and Plaintiff.

Appeal from the United States Court
of Appeals for the Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from the employment relationship between DEBORAH LYNN THORNE (hereinafter "THORNE"), and the City of El Segundo (hereinafter "CITY"), J. C. Devilbiss (hereinafter "DEVILBISS"), James Johnson (hereinafter "JOHNSON"), and John Hampton (hereinafter HAMPTON), wherein THORNE was deprived of her constitutional rights to privacy and freedom of association in violation of 42 U.S.C. §1983 (hereinafter "§1983"), and was illegally discriminated against on the basis of her sex, in violation of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §2000e (hereinafter "TITLE VII").

The Ninth Circuit, in reviewing the Findings of Fact and Conclusions of Law made by the trial court herein, found clear error, and reversed both the trial court's dismissal of THORNE's claim under §1983, and the judgment in favor of the CITY on her claim under Title VII. The questions presented for review by Petitioners in the Petition for a Writ of Certiorari are based on incorrect suppositions, and do not reasonably relate to the ruling made by the Ninth Circuit.

Contrary to Petitioners' contentions, the Ninth Circuit did not hold that sexual activities of employees may not be considered by police departments in making employment decisions; rather, the court held only that inquiry into these matters may not be unbridled, and further, that a police department may not apply standards based

on results of such inquiry to its female applicants when not similarly applied to male applicants.

The questions presented to the Ninth Circuit were simply:

1. Whether THORNE had a protectable right to privacy and association, and if so, whether there was evidence sufficient to support the trial court's judgment in favor of defendants on such issue, and

2. Whether THORNE had established a prima facie case of sex discrimination, and if so, whether there was evidence sufficient to support the trial court's judgment in favor of the CITY.

The court's opinion was detailed, well reasoned and consistent with existing authority. The Ninth Circuit found that the evidence was not sufficient as a matter of law to support the trial court's findings. Specifically, the Ninth Circuit found that the unbridled inquiry made in this instance did, in fact, invade protected privacy and associational interests. The court further found that THORNE had established a prima facie case of discrimination, and that while certain non-discriminatory reasons were articulated, THORNE had nevertheless demonstrated those reasons were mere pretext for discrimination in violation of Title VII.

II
STATEMENT OF FACTS

THORNE was originally employed by CITY as a clerk typist in the CITY's police department on December 3, 1973, and she was continuously employed in that position until November 8, 1979. She performed satisfactorily and, as indicated by an employment review dated June 22, 1978, she met or exceeded job requirements; her attendance and punctuality were at that time also rated "standard". (R.T. p. 253).

In or about January, 1978, the CITY announced it would accept applications from city employees who had completed a one-year probationary period, and who desired to become police officers. (R.T. p. 201, 202 and plaintiff's Exhibit 1). At the time of this announcement, THORNE had been employed with the CITY for four (4) years.

The announcement stated that candidates would be required to take a written and oral examination, a physical and psychological examination, as well as a polygraph test and a thorough background examination. Based on that announcement, on or about January 30, 1978, plaintiff filed an application with the CITY for the police officer position. (R.T. p. 414).

The CITY utilized a "Rule of Three" to rank the candidates, whereby applicants were ranked in numerical order on the basis of the written examination. The City would then hire candidates according to their ranked order, unless these candidates were

disqualified or otherwise eliminated. (R. T. p. 414). THORNE passed her written and oral tests and was ranked number two. (R.T. p. 19).

After the rankings were announced, the CITY informed the applicants of an additional, previously unannounced requirement: to pass a physical agility test. (R.T. pp. 19-20). The explanation for the CITY's failure to previously list this requirement and to require the candidates to pass this test before they were ranked, was a secretarial error.

THORNE took and successfully passed each of the six portions of the physical agility test which was scored on a pass/fail basis. (R.T. p. 21-22).

THORNE also completed a personal history statement (R.T. p. 25 and Exhibit 35). Personal history statements were used by the police department to initiate an investigation regarding an applicant's fitness for police work, e.g., reference checks, arrest record checks. (R. T. pp. 266-267).

Jim Antonius, of the El Segundo Police Department, whose regular assignment was to do background investigations of applicants, was assigned to do a background investigation on THORNE. (R.T. p. 299). As part of his investigation, Antonius reviewed THORNE's personal history statement. On Page 13 of this statement THORNE stated she had been hospitalized in April of 1977 for a "female problem". She also listed the names of other

police departments to which she had applied, including the Inglewood Police Department. (See Exhibit 35, Question 92).

Antonius also reviewed a "medical history statement" which THORNE had filed as part of her application to the Inglewood Police Department. In this statement, THORNE stated that in April of 1977 she was hospitalized for a "D&C", which Antonius ascertained was a dilation and curettage, or scraping of the uterus. (R.T. pp. 300-301).

Antonius then asked HAMPTON, a retired Los Angeles Police Department officer who was scheduled to give THORNE a polygraph examination, to inquire into the differences between her application with the City of El Segundo, which stated her hospitalization in April, 1977, was for a "female problem", and her application to the City of Inglewood, in which THORNE stated she was hospitalized for a "D&C" (R.T. p. 301). Antonius purportedly wanted to determine whether the pregnancy noted via the "D&C" and the "female problem" were the same, or whether THORNE had another problem which might disqualify her from the position as police officer. (R.T. p. 301).

The polygraph examination took place in April, 1978 at HAMPTON's office and lasted about five to six hours. (R.T. p. 28, 49, 92).

When THORNE began her polygraph examination, HAMPTON attempted to persuade her to withdraw her application with the CITY as a police officer and to

avoid having to take the polygraph exam by signing a form. (R.T. p. 28). THORNE decided to submit to the polygraph examination, knowing that a refusal would preclude her from being considered for the police officer position. (R.T. p. 36).

During the examination, THORNE completed a lengthy and detailed questionnaire supplied by HAMPTON (R.T. p. 29). (See also plaintiff's Exhibits 31, 32 and 34). HAMPTON then proceeded to question THORNE in depth regarding her sexual activity. He asked her questions regarding when she first had sex, whether she slept with more than one person at a time, if she had had any homosexual experiences, and whether she had problems with her menstrual cycle.

HAMPTON spent a large portion of the polygraph examination probing the reasons for THORNE's hospitalization in April of 1977. (R.T. pp.32, 33). After several detailed and rapid-fire questions, THORNE confidentially disclosed that she and Sergeant Waite of the El Segundo Police Department had an affair during which she had become pregnant and had subsequently suffered a miscarriage. (R. T. pp. 33, 34). HAMPTON asked THORNE, "How in the world did this thing occur?", and pursued the topic with vigor, gathering admissions from her that she had fallen in love with Sergeant Waite and would have married him if things had "worked out" properly. (R. T. P.28).

During the polygraph examination, HAMPTON reassured THORNE at least three times that her answers would be kept

completely confidential and that the questions were merely needed for the polygraph examination. (R.T. p. 36). Although THORNE has signed a release of information, she did not realize it at the time, and further believed and relied on HAMPTON'S assurances that he would not disclose the intimate facts she had confided to him.

While HAMPTON questioned THORNE, he repeatedly urged her to withdraw her application as a regular police officer and to become a reserve officer instead. He told her she might fail in the academy after giving up her clerk typist job, which was protected by the Civil Service. (R.T. pp. 49 and 296).

He also spent a great deal of time during the interview imparting his personal view that women do not belong in law enforcement in sworn officer positions. (R.T. p. 40). He further stated that women are only suited for office-type jobs, and that they are not aggressive or physically strong enough to be out in the field. (R.T. p. 46). Although perhaps "an Amazon" could equal a man's strength, according to HAMPTON, he would not like to see a woman alone in the early morning watch in a place like Skid Row. (R.T. p. 120).

THORNE was ultimately hooked up to the polygraph machine for only approximately 5 to 10 minutes to answer a few questions which verified that she was telling the truth (R.T. p. 48).

Contrary to his repeated assurances to THORNE that he would not violate her request for confidentiality

by disclosing the intimate information she had discussed during her polygraph examination, HAMPTON communicated the detailed information regarding THORNE's affair between THORNE and Sgt. Waite to both DEVILBISS and JOHNSON at the El Segundo Police Department. (See plaintiff's Exhibit 10).

HAMPTON also informed DEVILBISS and JOHNSON that in his opinion THORNE was not sufficiently aggressive, self-assured or possessed of sufficient physical ability to handle herself in stress situations. (R.T. p. 201). These statements were made despite HAMPTON's knowledge that THORNE successfully passed all parts of the police officer examinations, including the physical agility test and despite the fact that HAMPTON did not have THORNE complete any physical skills examination during her polygraph examination.

Approximately two weeks after receiving HAMPTON's written report, JOHNSON called THORNE into his office. (R.T. p. 53). During that meeting, JOHNSON informed THORNE that he was concerned that if she became a police officer in El Segundo, she would carry her "promiscuous activities" into the field. (R. T. p. 54). JOHNSON further informed THORNE if she failed to withdraw her application immediately, he would distribute the information obtained from the polygraph examination to the background investigators, and that other police officers would find out and would consider her "an easy lay" (R.T. p. 55). He alternatively informed her that if she withdrew her

application, he would not release this intimate information to the background investigators (R.T. p. 56). Despite this threatened exposure, THORNE chose not to withdraw her application, but chose to pursue her desire to become a police officer for the City of El Segundo. (R.T. p. 56).

After THORNE's decision not to withdraw her application, JOHNSON did, in fact, disclose the confidential information to other police personnel.

Prior to such disclosure, THORNE held an excellent reputation in the police department, particularly with JOHNSON and DEVILBISS. The love affair between THORNE and Sergeant Waite had at all times been conducted during off-duty hours. (R.T. p. 74). In fact, this love affair was so private and discrete that neither DEVILBISS, JOHNSON, nor anyone else in the police department at large had any knowledge at all of the existence of their affair. The department first became aware of the affair only after the release of HAMPTON's report to DEVILBISS, JOHNSON, and their secretarial personnel. (R.T. p. 231 and 244).

The intensely personal scope and rapid-fire method of questioning which HAMPTON employed during his polygraph examination of THORNE was not an isolated procedure unique to the examination of THORNE. Jeannie Metcalf, another female applicant, testified that HAMPTON also asked her shocking sexual questions at her polygraph examination in connection with another police department application. (R.T. p. 328).

THORNE and Ms. Metcalf both knew HAMPTON's reputation for asking sexual questions of female police officer applicants (R.T. p. 27 and 340). The testimony at trial also revealed that both DEVILBISS and JOHNSON were fully aware of HAMPTON's reputation for asking these far-reaching, extremely personal sexual questions, particularly of female applicants. Yet neither DEVILBISS nor JOHNSON took steps to impose any limitations nor did they set forth any guidelines regarding the questions that HAMPTON could direct to applicants during polygraph examinations. (R.T. p. 222, 249).

HAMPTON was also never instructed as to the types of information he was to obtain from an applicant, in order to ascertain any potentially disqualifying characteristics. He was similarly uninstructed in the types of information he should or should not transmit from the polygraph examination. (R.T. p. 225). HAMPTON had free reign to use whatever criteria he personally believed to be adequate measurement of THORNE'S moral fitness.

At the time of THORNE's polygraph examination, neither DEVILBISS nor JOHNSON nor any other police department officer had made a specific determination regarding what questions should be asked to ascertain whether a person has sufficiently good moral standards to become a police officer. (R.T. p. 225). Furthermore, there were no written guidelines regarding what should be considered in determining whether a person has sufficient moral standards to be a police officer. (R.T.

p. 25).

The next step in THORNE'S application process was a psychological interview which she completed and successfully passed. (R.T. p. 57). She was never given the medical examination which would have been the last test to qualify her as a police officer. (R.T. p. 57).

On June 2, 1978, DEVILBISS, in a memo to JOHNSON, recommended that THORNE be removed from the eligibility list. In his recommendation, DEVILBISS acknowledged that THORNE had passed the physical agility test, stated but he felt her performance on the pass/fail exam was "marginal in almost all phases" and revealed her physical competence to be "borderline". (Plaintiff's Exhibit 11).

DEVILBISS referred to the opinion of HAMPTON to the effect that THORNE was not sufficiently aggressive, self-assured or possessed of enough physical ability to handle herself in stress situations. DEVILBISS considered in his recommendation that THORNE had had an affair with Sgt. Waite; and he further pointed out that THORNE's attendance record and tardiness record were deficient.

DEVILBISS concluded his memo on THORNE by stating that she would have problems with physical training at the academy since she was a "feminine-type person" who was "apparently very weak in the upper body." (R.T. p. 214). JOHNSON approved DEVILBISS' recommendation to disqualify THORNE (R.T. p. 241), and

selected a male to fill the position of police officer.

Although the primary reason officially given by JOHNSON for THORNE's disqualification was a poor attendance and punctuality record, he admitted at trial that other factors he also took into account were the opinions of HAMPTON and DEVILBISS regarding THORNE's weakness in the upper body and his knowledge of the affair between her and Sgt. Waite. (R.T. p. 241-242). After THORNE was denied a police officer position, she complained about the fact that she had been denied the appointment. (R.T. p. 135). There followed a period of harassment, and THORNE's working conditions became increasingly difficult. For example, on May 9, 1978, approximately two weeks after the polygraph examination had been conducted, THORNE received a written reprimand for being tardy. This was the first written reprimand she had received in the years she worked at the El Segundo Police Department (R.T. p. 60).

On June 22, 1978, just a few weeks after she was disqualified, THORNE was given an employment review. This review indicated that her attendance and punctuality were "standard" and that she met or exceeded job requirements. (R.T. p. 253). Further, in the space provided for comments, her supervisor noted that THORNE had substantially reduced her sick time. (R.T. p. 65 and Exhibit 7).

The only other woman who applied for the El Segundo Police Department position with THORNE was Jeannie Metcalf; she also was not hired by El

Segundo. (R.T. p. 314, 315). Although Mr. Metcalf was rated No. 1 in both the oral and written tests in connection with her application, she was not given the balance of the tests necessary for her application to be processed. (R.T. p. 315). The excuse offered by the El Segundo Police Department for not allowing Ms. Metcalf to complete the test was that she had applied to the City of Ontario also and was being processed simultaneously by that department. When Ms. Metcalf complained that her application was not being completed, she was told by JOHNSON that El Segundo would not continue to process her application while she had another application pending. No other police departments had demanded similar exclusive application processes. (R.T. p. 317). Ms. Metcalf asked whether or not she would be assured of a job at El Segundo if she decided to withdraw her application from Ontario. (R.T. p. 316). JOHNSON refused to give her any such assurances. (R.T. p. 316). As a result of Ms. Metcalf's refusal to withdraw her application from Ontario, the El Segundo Police Department never completely processed her application. She eventually gave up and accepted a job at Ontario. (R.T. p. 317).

The City of El Segundo employed only two women police officers out of a total of 58 officers who had been employed at the time of THORNE and Ms. Metcalf's applications. Both women were in "the investigative division", one in the juvenile and one in the detective department. (R.T. p. 198). A third woman on the police staff was fired after not having passed her probationary

period as an officer. (R.T. p. 198-199). Furthermore, at the time of trial, it was ascertained that five or six male officers had been hired since THORNE's application with El Segundo. Not all of these men had to take and pass the physical agility test which was a requirement for THORNE. (R. T. P. 220).

It soon became a matter of common knowledge within the El Segundo Police Department that THORNE and Sgt. Waite had had an affair. (R.T. p. 172). All of her working acquaintances became aware of this, causing her a tremendous amount of anxiety and emotional distress. (R.T. p. 62). THORNE was excluded from social interaction among the office personnel because of their knowledge of the affair, and more importantly, because of possible department sanctions for associating with THORNE. (R.T. p. 176).

In November of 1978, THORNE submitted her resignation from employment. (R.T. p. 62-63). Shortly thereafter, she requested the CITY to disregard her resignation. (R.T. p. 63). As they refused to do so, THORNE became unemployed; it was not until sometime later that she was able to secure employment at a lower salary. (R.T. pp. 64, 66 and 144 and (R.T. pp. 177-196).

The treatment she received at the hands of the polygraph examiner, the Chief of Police and others, eroded THORNE's self-confidence, and created feelings of inferiority in her; she felt it impossible to actively pursue a

career in law enforcement. (R.T. pp. 179-180). As a result of HAMPTON's disclosure of her personal life to officers in the El Segundo Police Department, coupled with the rejection of her application for police officer, THORNE also felt unable to associate with her former co-workers and friends and gradually became socially isolated.

THORNE testified at trial that after the emotional assault she suffered during the polygraph exam, she experienced ongoing headaches, insomnia and became extremely nervous, depressed, and easily agitated, (R.T. pp. 170, 58-59), eventually seeking medical treatment. (R.T. pp. 158, 168).

III
ARGUMENT

A. There Is No Genuine Conflict Among the Circuits Requiring This Court's Review.

Consistent with existing authority, the Ninth Circuit, in ruling herein, acknowledged that public employers may consider sexual conduct of applicants in making hiring decisions. The circuit also recognized the constitutionally protected individual interests in privacy and association, an issue petitioners now appear to dispute. See Kelly v. Johnson, 425 U.S. 238, 244 (1970); Roe v. Wade, 410 U.S. 113, 153 (1973); and Griswold v. Connecticut, 381 U.S. 479 (1965).

Contrary to petitioners' attempt to create a conflict among decisions, (see Petition for Certiorari, p. 8), the Ninth Circuit reasoned, based on acknowledged authority, that the petitioners' actions in this case went beyond that necessary to protect legitimate interests in securing qualified police officers, thus invading THORNE's rights, in violation of §1983.

In the words of the Ninth Circuit:

> "The City set no standards, guidelines, or limitations, other other than the polygraph examiner's own opinion, as to what might be relevant to job performance in a particular case. When the state's questions directly intrude on the core of a person's constitutionally

> protected privacy and associational interests as the questioning of the polygraph examiner did in this case, an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action."

Thorne v. City of El Segundo, 726 F.2d 459, 470 (9th Cir. 1983)

Notwithstanding petitioners' characterizations, the Ninth Circuit opinion does not conflict with the holding in Shawgo v. Spradlin, 701 F.2d 470 (Fifth Cir. 1983), cert. denied _____ U.S._____, 104 S.Ct. 404, 78 L.Ed. 345 (1984), which held that police departments may consider sexual conduct in employment decisions. Nor does the ruling conflict with Espinoza v. Thoma, 580 F.2d 346 (Eighth Cir. 1978), where the court held that unmmarried couples could be prohibited from working together. Although Shawgo, id., and Espinoza, id., both dealt with the question of a police department imposing limitations upon activities of its employees, neither of these cases contradicts the holding of the Ninth Circuit herein, and, indeed, neither even involves a similar type of intrusion into the protected sphere of privacy implicated by petitioners' unbridled inquiry into THORNE's sexual activities. Distinct from Shawgo and Espinoza, where a specific departmental regulation precluded certain activities, the challenged practices at bar were without "standards, guidelines

definitions or limitations", and could not be shown to be narrowly tailored to a legitimate state interest. (Thorne, supra, at 470).

Close examination of the Ninth Circuit opinion reveals the careful attention paid to the state's interests in regulating the conduct of its employees. Indeed, the Ninth Circuit considered the Shawgo case in its ruling. (See Thorne, supra, fn 10 at 470). But the court, more importantly, noted the fundamental rights of individuals seeking state employment may not be lightly infringed upon. "The more fundamental the rights on which the state's activities encroach, the more weighty must be the state's interest in pursuing that course of conduct." Thorne, supra, at 467.

This court has similarly held on many occasions that where the government intrudes on choices concerning family living arrangements, the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation must be carefully examined. See Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977), See also Roe v. Wade, supra, and Griswold, supra, where personal choice decisions about sexually related matters were reviewed with a higher level of scrutiny than Petitioners would suggest herein.

Thus, the level of scrutiny utilized by the Ninth Circuit in reviewing the challenged actions was proper and within the mandate of this court. Other courts may have required

that the state need only demonstrate a rational basis for restriction on certain protected rights; however, those cases present factually distinguishable situations, and, as such do not create a genuine conflict among circuits, as petitioners would have this court believe.

B. The Ninth Circuit Applied the Correct Burden of Proof and Properly Concluded That the Evidence Did Not Support a Finding that Petitioners' Reasons for THORNE'S Rejection Were Non-Discriminatory.

The Ninth Circuit properly concluded that THORNE met the burden of proof sufficient to establish a violation of Title VII. By arguing that the Ninth Circuit failed to comply with this court's decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), in that the Circuit was somehow suggesting that an employer in a Title VII action bears the burden of proof, Petitioners misunderstand Burdine, id; acceptance of Petitioners' argument would render Burdine virtually meaningless.

In fact, the Ninth Circuit's decision was in complete compliance with the standards set forth in Burdine. The circuit initially found the evidence revealed that THORNE had established a prima facie case of discrimination. Although it concluded that her employer had rebutted this prima facie case by failing to hire her, the court then found that THORNE had proved that the asserted non-discriminatory reasons were pretextual. The court stated,

> "The non-discriminatory reasons offered by the CITY and accepted by the district court to justify the refusal to hire appellant are simply incredible and clearly pretextual."

Thorne, at 467.

The court held that THORNE had proved that she had been illegally discriminated against on the basis of sex, in violation of Title VII. The circuit understood the requirement that plaintiff in the employment discrimination case must carry the burden of proof at all times:

> "At the third and final stage of a discriminatory treatment case as outlined recently in Aikens, 103 S.Ct. at 1482, the plaintiff must carry the ultimate burden of proving intentional discrimination. 'She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' Burdine, 450 U.S. at 256, quoted in Aikens, 103 S.Ct. at 1482."

Thorne, supra, at 465.

In this case, the thrust of Thorne's proof was to show that the articulated reasons for not hiring her were mere pretexts for discrimination, masking the real reason that she was

rejected because of sex-based stereotypes and standards of moral integrity that applied only to women.

Petitioners claim that the circuit court placed the burden of proof on the employer when it "arbitrarily reassessed" and weighed the sufficiency of the employer's evidence, which was supposedly sufficient to rebut plaintiff's prima facie case. (See Petition for Certiorari, pp. 18-19). This claim reflects Petitioners' fundamental misunderstanding of Burdine.

It is clear that the circuit never "reassessed" the employer's evidence as to pretext; similarly, the circuit's decision was not based on ability or inability to prove non-discrimination. Quite clearly, the decision was based on the fact that the Ninth Circuit found overwhelming evidence in the record that the alleged non-discriminatory reasons were pretext, and that THORNE was, in fact, illegally discriminated against. As in all Title VII cases, the burden of proof always rested with the plaintiff herein.

Petitioners argue that once the circuit found that the employer had provided non-discriminatory reasons to rebut the plaintiff's prima facie case, it is precluded from finding that the reasons were pretextual. Petitioners further argue that although plaintiff is permitted to offer evidence of pretext or non-credibility of the asserted reasons, the court's consideration of this evidence necessarily places the burden of proof on the employer. The fallacy of this argument is readily

apparent.

Burdine clearly states that once the employer rebuts the inference of discrimination created by the plaintiff's prima facie case, through articulation of non-discriminatory reasons therefor, plaintiff then has the opportunity to prove that the non-discriminatory reasons in the employer's rebuttal are merely pretextual. Burdine, supra, 67 L.Ed.2d at 217. Petitioners seek to obliterate the mandate of Burdine, by claiming that the mere opportunity to prove pretext, once non-discriminatory reasons have been articulated, places the ultimate burden of proof on the employer. In essence, Petitioners seek to disallow proof of pretext in complete disregard of prior authority.

Petitioners attempt to couch their arguments in subtle semantics by purportedly acknowledging that Burdine permits the presentation of evidence as to pretext. Yet this acknowledgement is nullified by Petitioner's consequent assertion that if the trial court found that the prima facie case was rebutted, a reviewing court may then not find such rebuttal pretextual. The finding of the Ninth Circuit that "the district court was clearly erroneous in its conclusion that appellant was rejected for non-discriminatory reasons that were not pretextual", (Thorne, supra, at p. 465), can in no way be logically construed as placing the burden of proof on the employer.

Thus, Petitioners' argument at pages 18 and 19 of the Petition for

Certiorari that a finding that their articulation of non-discriminatory reasons precludes liability under Title VII, must be rejected. As described above, to state the proposition demonstrates its absurdity. Burdine does teach that an employer must introduce admissible evidence "legally sufficient to justify a judgment on its behalf." Burdine at 255. However, Burdine teaches also that an employee must be given the opportunity to demonstrate that such evidence, while admissible and probative, is, nonetheless, pretextual and not to be believed. The choreography of the burden of proof and production in a Title VII case enunciated by this court in Burdine, provides the framework for reasoned analysis of the evidence actually provided and should not be construed artificially to limit an employee's ability to prove discrimination. In this case, giving due regard to the district court's findings, the Ninth Circuit held that:

> "A review of the exhibits and the transcript in this case leads us to form the firm conviction that the district court was clearly erroneous in its conclusion that appellant was rejected for non-discriminatory reasons that were not pretextual."

Thorne, supra, at 465.

The Ninth Circuit found the evidence overwhelming in favor of THORNE to show understanding and finding on the basis of the record herein, that plaintiff had sustained the burden of

persuasion required to prove a violation of Title VII.

Petitioners are playing a semantic game in utter disregard of both the purpose and substance of Burdine, in a shallow attempt to avoid the consequences of their unlawful conduct.

IV
CONCLUSION

The Appellate Court's ruling does not depart from any established legal principles nor conflict with any decision of this Supreme Court or other federal courts. What the Ninth Circuit held was that the trial court's findings were clearly erroneous in light of the "overwhelming evidence" of discrimination and violation of THORNE's constitutionally protected rights. The decision simply does not present such novel questions of law as to merit the consideration of the Supreme Court.

Accordingly, Respondent THORNE respectfully requests that the subject Petition for Writ of Certiorari be denied.

Dated:

ALLRED, MAROKO, GOLDBERG & RIBAKOFF

By Gloria Allred

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